SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 699

PEOPLES PACKING COMPANY, INC., A CORPORATION,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES S. TWYFORD,
SOLON W. SMITH,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Petition for Writ of Certiorari.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of Matter Involved.

This case was begun in the United States District Court for the Western District of Oklahoma for an injunction by the Administrator seeking to bring the petitioner under the

provisions of the Fair Labor and Standards Act of Congress (U. S. C., Title 29, Sec. 201 et seq.).

The complaint alleges that the defendant (below) is "engaged in the production, sale and distribution of live stock products and live stock by-products".

That "the goods produced by said employees in said place of business have been and are being produced for inter-state commerce, and have been and are being sold, transported and shipped and offered for sale to, unto and through states other than the State of Oklahoma".

The District Court found that the petitioner was not "engaged in inter-state commerce or the production of goods for interstate commerce or the sale of goods for inter-state commerce", and "was engaged in production and sale of goods entirely within the boundaries of the State of Oklahoma" (R. 67).

The trial court further found that the petitioner's plant was a "service establishment" within the meaning of Sec. 13 (a) 2 of the Act, and that the employees of the petitioner were exempt from the Act.

These findings of fact and conclusions of law of the trial court are as follows (R. 64-66):

"Findings of Fact

The court, having heard the evidence and the cause having been submitted, finds from the evidence the following facts:

The defendant is engaged in the slaughter and sale of livestock in Oklahoma City, Oklahoma, and has been for many years last past. It purchases its animals for slaughter and sale all within the state of Oklahoma. The slaughtering of the animals is conducted at its plant in Oklahoma City. The edible portion of the animals is prepared for market and sold entirely within the state of Oklahoma and consists of in excess of 95 per cent of the value of the carcasses. The inedible

portion consists of the hides and the offal and represents from 3 to 4 per cent of the value of the carcasses and approximately 45 per cent of the weight of the carcasses. The hides are sold to a purchaser in Oklahoma City who, when he has accumulated and conditioned a carload, ships to points outside the state. The offal is purchased by a corporation in Oklahoma City which reduces it to grease, tankage and waste and sells the grease to soap manufacturers outside the state.

The defendant employs from thirty to forty persons. From four to seven handle the killing, removal of the hides and the offal in connection with their other work in the plant. The hides and offal are sold immediately from the plant.

The court further finds that it would be impossible for the defendant to slaughter its cattle and hogs and prepare the edible portion thereof for market without removing the hides and offal. In the early history of the industry the offal had little or no value and usually was hauled to a garbage dump and destroyed, and the hides had only nominal value. The court further finds from the evidence that the value of the hides and offal, being that portion of the carcass which is edible, represents from 3 to 4 per cent of the total value of the carcass. Therefore, the removal of the hides and offal from the edible portion of the animal is as much, or more, an act in connection with the preparation of the edible portion for market as it is an act in the salvaging of the inedible portion.

The court further finds that the employees of the defendant do not manufacture the hides and offal. They merely remove the inedible portion from the edible portion. They could not be producers of the inedible portion of the animals except as servicing and handling the hides and the offal make the employees producers. The hides and offal, when sold, are in exactly the same condition they were before removal from the animals except that they have been separated from the edible portion. The inedible portion is sold at the dock of the plant of the defendant and the defend-

ant has nothing more to do with the inedible portion after it leaves its dock.

The court further finds that in removing the inedible portion of the carcass from the edible, or the edible from the inedible, the defendant was performing a service as hereinabove stated.

The court further finds from the evidence that at no time in the conduct of the business of the Peoples Packing Company, Inc., has the Government Inspector ever inspected the meats or products of the defendant for sale, or attempted to do so, in any way.

The plaintiff is allowed an exception.

Dated this 11th day of February, 1942.

EDGAR S. VAUGHT,
United States District Judge.

CONCLUSIONS OF LAW.

The court concludes, as a matter of law, in the above entitled case, in connection with the findings of fact filed herewith, as follows:

I.

That the defendant, Peoples Packing Company, Inc., is not engaged in interstate commerce and is not engaged in the production of goods for interstate commerce within the meaning of the Wage and Hour Law of the United States, and has not been so engaged at any time prior to the trial of this action.

II.

That the establishment operated by the defendant was a "service establishment" within the meaning of Section 213, Title 29 U. S. C. A. (Section 13 (a) (2) of the Fair Labor Standards Act of 1938) and the employees of the defendant therein exempt from the provisions of Sections 206 and 207, Title 29, U. S. C. A. (Sections 6 and 7 of the Fair Labor Standards Act of 1938).

III.

That the defendant, Peoples Packing Company, Inc., is not, and never has been, engaged in interstate com-

merce or the production of goods for interstate commerce or the sale of goods in interstate commerce, but is, and has been, engaged in the production and sale of goods entirely within the boundaries of the state of Oklahoma.

IV.

That the plaintiff is not entitled to an injunction against the defendant or any relief, under the pleadings and the evidence, and that the injunction should be denied at the cost of the plaintiff.

The court finds the issues, generally, in favor of the defendant. The plaintiff is allowed an exception.

Dated this 11th day of February, 1942.

EDGAR S. VAUGHT,
United States District Judge."

(The opinion of the District Court is reported, as Fleming vs. Peoples Packing Co., 42 Fed. Supp. 868.)

The findings of fact of the trial court were not challenged in the Circuit Court of Appeals.

The trial court concluded as a matter of fact and as a matter of law that the petitioner was not "engaged in the production of goods for commerce" while the Circuit Court said "we conclude that the employees in question were engaged in the production of goods for commerce and in handling and working on such goods". And this notwithstanding the undisputed fact that all hides and offal were sold and delivered to purchasers in their raw condition all within the State of Oklahoma, and the petitioner has no control over the same after sale and delivery.

So the controversy is, did the petitioner "produce goods" for interstate commerce?

The question of direct and indirect effect on commerce is here involved. The Federal Courts uniformly hold that, if the activities only affect inter-state commerce indirectly that the act does not cover such activities. That is this case.

The edible goods were all sold in Oklahoma. The inedible were all sold and delivered in Oklahoma. The purchasers did with them what they pleased.

By reason of the holding of the Circuit Court of Appeals the petitioner is brought under the Act when under the undisputed facts in the record it claims that it is not subject thereto. The petitioner further claims that under the facts as a matter of law it is not within the letter or spirit of the Act itself.

The trial court denied the injunction. The Circuit Court of Appeals held "the judgment is reversed and the cause remanded with instructions to grant the injunction".

II.

Jurisdiction.

1. The date of judgment of the Circuit Court of Appeals to be reviewed is December 16, 1942 (Tr. 87). The opinion of the Court was handed down on the same day (Tr. 81).

2. The statutory provision under which the jurisdiction of this Court is invoked and which is believed to sustain its jurisdiction is Section 347 (a) of Title 28 of the United States Code, being Section 240 of the Judicial Code, as amended.

3. The decision of the court below is in conflict with the decisions of various Circuit Courts of Appeals and of this Court, and decides an important question of federal law which has not been, but should be settled by this Court, and decides an important question of general law in a way in conflict with all authority. This Court entertains jurisdiction to grant writs of certiorari in similar cases at every term, and there can be no need to list any of the array of cases in which its jurisdiction is so exercised except two cases arising under the Act in question: *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Warren-Bradshaw Drilling Co.*

v. *Hall* (decided Nov. 9, 1942, 87 L. ed. 99), *Higgins* v. *Carr Brothers Co.*, No. 97, October Term, 1942 (decided January 18, 1943), *Walling* v. *Jacksonville Paper Co.*, No. 336, October Term, 1942 (decided January 18, 1943).

4. The petition for the writ is presented under Rule 38, paragraph 5 (b), of the Revised Rules of this Court adopted February 13, 1939, and effective February 27, 1939.

III.

Questions Presented.

The questions presented on this petition may be stated as follows:

1. Where the petitioner operates a packing plant in Oklahoma and where all of the products and goods produced are sold and delivered within the State of Oklahoma, and none are produced for sale or sold outside of the state, do the employees of such plant, or any of them, come under the provision of the Fair Labor Standards Act of Congress (U. S. C. Title 29, Sec. 201 et seq.) merely because some of the hides and offal are converted into by-products by third persons who purchase and treat the same, as they see fit, after title to the same passes to them and the petitioner completely loses control thereof.

2. Do the employees of the petitioner fall under the exemption section of the Act because the removal of the hides and offal constitutes a servicing within the meaning of the exemption section of the Act?

IV.

Reasons Relied Upon for Allowance of the Writ.

The petitioner relies on the following reasons for the allowance of the writ of certiorari:

1. The Circuit Court of Appeals in holding as a matter of law, on the undisputed facts, as found by the trial court,

that the petitioner and certain of its employees are under the provisions of the Act of Congress in question and produced goods for commerce, is in conflict with the following decisions, which hold that indirect effect only on interstate commerce will not bring the employees of petitioner under the act.

Schechter v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, where it is said "* * * the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal power, and for all practical purposes we should have a completely centralized government". Chief Justice Hughes, speaking for the court, said:

> "The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employes should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce."

Myers et al. v. *Bethlehem Ship Building Corporation* (First Circuit), 88 F. (2d) 154.

Industrial Association v. *United States,* 268 U. S. 64, 82, 69 O. (ed.) 839, 855, 45 S. Ct. 403.

Petitioner claims that the opinion in the instant case is in conflict with the opinion of the 10th Circuit in *Jewell Tea*

Company v. *Williams,* 118 F. (2d) 202, where it is held by this Circuit that "the mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce".

Also conflicts with *Lipson* v. *Socony Vacuum Corporation,* 87 F. (2d) 265, First Circuit. (Writ granted dismissed by stipulation (81 L. Ed. 862 and 1364).)

Also conflicts with *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 70 L. Ed. 750, and *Ware & Leland Co.* v. *Mobile County,* 209 U. S. 405, 52 L. Ed. 855.

Petitioner submits that the opinion in the present case is in conflict with the principles set out in the learned opinion of Mr. Justice Frankfurter construing the very act of Congress in *Kirschbaum* v. *Walling,* 316 U. S. 517, holding that each case must be determined on the exact facts to determine whether or not the act was intended to or does cover the activities of the party.

2. The Circuit Court, in holding that the petitioner was under the Act under the undisputed facts, went further than the terms of the Act will permit.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in cause No. 2571 in said Court, entitled L. MetcalfeWalling *vs.* Peoples Packing Co., to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment of said United States Circuit Court of Appeals in said case be re-

versed by this Court, and that petitioner have such further relief as to this Court may seem proper.

Dated at Oklahoma City, Oklahoma, this — day of January, 1943.

PEOPLES PACKING COMPANY, INC.,
Petitioner.

By JAMES S. TWYFORD,
SOLON W. SMITH,
907 Tradesmens National Bank Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The case originated in the District Court of the United States for the Western District of Oklahoma. The trial court denied the injunction. The opinion is reported, *Fleming* v. *Peoples Packing Company, Inc.*, 42 Fed. Supp. 868. The Circuit Court of Appeals of the Tenth Circuit reversed the case with directions to grant the injunction.

This opinion is not yet officially reported. The opinion is a part of the transcript herein (Tr. 81).

II.

Statement of Case.

The statement of the case containing all that is material to the consideration of the questions presented has been made in the petition for the writ and such statement is hereby adopted and made a part of this brief.

III.

Assignment of Errors.

The petitioner makes the following assignment of errors committed in the opinion and decision of the court below:

One.

The Circuit Court of Appeals erred in holding under the facts shown by the record before it that the petitioner by reason of its operation of the packing plant came under the provisions of the Fair Labor Standards Act of Congress, U. S. C., Title 29, Sec. 201, *et seq.*, and therefore erred in reversing the trial court and in directing that an injunction be granted against the petition as prayed for in the complaint.

Two.

The Circuit Court of Appeals erred in not holding that the petitioner came under the exemption clause of the Act.

Three.

The Circuit Court of Appeals erred in not holding that the injunction should be denied, and in not affirming the judgment and decree of the District Court.

IV.

ARGUMENT.

Proposition One.

Under the Undisputed Facts the Petitioner and Its Employees Do Not Come Within the Provisions of the Fair Labor Standards Act.

The facts as found by the trial court and as shown by the record, are these:

The petitioner is engaged in the slaughter and sale of livestock in Oklahoma City, and has been for many years. It buys its animals for slaughter and sale within the State of Oklahoma. The slaughtering is conducted at its plant in Oklahoma City. The edible portions of the animals are prepared for market and sold entirely within the State of Oklahoma, consisting in excess of 95 per cent of the value of the animals. The inedible portion consists of hides and the offal and represents from 3 to 4 per cent of the value of the animals. The hides are sold to purchasers in Oklahoma City. The offal is sold to purchasers in Oklahoma City. The purchaser of the offal reduces it to by-products and sells the same to manufacturers outside the State. The purchaser of the hides ships some of the same outside the State. There is no connection whatever between the petitioner and the purchasers of the hides and offal other than vendor and vendee.

The trial court found as a fact that the removal of the hides and offal was a servicing of the edible portions of the animals. (The findings quoted *supra*) (R. 64-66).

The petitioner respectfully contends that it was not engaged in "producing goods for commerce among the states", and that the only effect the sale of the hides and

offal could possibly have on commerce is an "indirect effect". That in order for the petitioner to be under the act would be for it to produce goods for interstate commerce, and it only produced "goods" for sale and delivery in the State. All sales come to complete rest in the State.

In defining what is the "production of goods for interstate commerce" the Supreme Court of the United States in *U. S.* v. *F. W. Darby Lumber Company,* 312 U. S. 100, 85 L. Ed. 395, says:

> "To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under Sec. 15 (a) (2) as they were construed below, constitute 'production for commerce' within the meaning of the statute. As the government seeks to apply the statute in the indictment, and as the court below construed the phrase 'produced for interstate commerce'. It embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders of extra-state customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be elected for shipment to those customers".

In *Myers* v. *Bethlehem Shipbuilding Corporation,* 88 F. (2d) 154, it is held:

> "Employees of corporation engaged in shipbuilding and also doing small amount of other manufacturing, involving interstate transportation of raw materials as well as finished products, held not engaged in 'interstate commerce' nor in business within jurisdiction of National Labor Relations Board (National Labor Relations Act, 29 U. S. C. A., Sec. 151, et seq.)."

In the opinion it is said:

> "The respondent in the course and conduct of its business causes and has continuously caused large

quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states."

"The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the board, and if not, the board is acting without authority and in violation of law. Cases, supra. See, also, Carter *v.* Carter Coal Co., 298 U. S. 238, 303, 304, 56 S. Ct. 855, 80 L. ed. 1160."

The Supreme Court of the United States, speaking through Chief Justice Hughes in *Schechter* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570, said:

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Co. *v.* United Mine Workers, 268 U. S. 295, 310, 69 L. ed. 963, 970, 45 S. Ct. 551. But where that intent is absent and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the Federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. United Mine Workers *v.* Coronado Coal Co., 259 U. S. 344, 410, 411, 66 L. ed. 975, 995, 42 S. Ct. 570, 27 A. L. R. 762; United Leather Workers International Union *v.* Kerkert & M. Trunk Co., 265

U. S. 457, 464-467, 68 L. ed. 1104, 1106, 1108, 44 S. Ct. 623, 33 A. L. R. 566; Industrial Asso. *v.* United States, 268 U. S. 64, 82, 69 L. ed. 839, 855, 45 S. Ct. 403; Levering & G. Co. *v.* Morrin, 289 U. S. 103, 107, 108, 77 L. ed. 1062, 1065, 1066, 53 S. Ct. 549. In the case last cited we quoted with approval the rule that had been stated and applied in Industrial Asso. *v.* United States, supra, after review of the decisions, as follows: 'The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act'. While these decisions related to the application of the Federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.

"The question of chief importance relates to the provisions of the code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle

commodities brought into a state and there dealt in as a part of its internal commerce."

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, the court says:

"As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade', and includes transportation, purchase, sale and exchange of commodities by the citizens of the different states.

"The power to regulate commerce, embraces the instrumentalities by which commerce is carried on.

"That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to Federal regulation under the commerce clause.

"The power of Congress to regulate interstate commerce does not extend to the establishment of minimum wages, maximum hours of labor, the right of collective bargaining, and conditions of employment in the bituminous coal-mining industry.

"The power of Congress under the commerce clause is limited to matters directly affecting interstate or foreign commerce, and does not extend to matters, the effect of which, whatever its extent, is indirect.

"The Federal regulatory power in matters relating to interstate commerce ceases when commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins."

(In the case at bar the commercial intercourse ended when the hides and offals were sold to local concerns.)

In the opinion it is said:

"The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the Schechter case, supra. The only perceptible difference between that case and this is

that in the Schechter case, the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceased when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the Schechter case. On the contrary, the situations were recognized as akin. The opinion, at page 546, after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: 'Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.' And again, after pointing out that hours and wages have no direct relation to interstate commerce and that if the federal government had power to determine the wages and hours of employees in the internal commerce of a state because of their relation to cost and prices and their indirect effect upon interstate commerce, we said, p. 549:

" 'All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not a power.'

"A reading of the entire opinion makes clear what we now declare that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production

before interstate commerce has begun, or to sale and distribution after it has ended."

A case squarely in point is *Bagby* v. *Cleveland Wrecking Co.*, 28 Fed. Supp. 271.

The court held:

"The mere fact that goods manu*g*actured or produced locally pass later into interstate commerce does not make the transaction one constituting 'interstate commerce'. U. S. C. A., Const. Art. 1, Sec. 8, cl. 3.

"For a local activity to come within the interstate commerce clause, it must have more than an indirect and remote effect upon interstate commerce. U. S. C. A. Const., Art. 1, Sec. 8, cl. 3.

"In action to recover wages and damages for alleged violation of Fair Labor Standards Act, complaint alleging that plaintiffs were employed to clean brick, wood and other materials salvaged from old structures, the greater part of which was shipped and transported to other states, and there sold, merchandised or disposed of, was required to be dismissed since complaint did not show that employer was engaged in 'commerce'. Fair Labor Standards Act of 1938, Sec. 1, et seq., and Sec. 6, 29 U. S. C. A., Sec. 201, et seq., and Sec. 206."

In *Santa Cruz Trust Packing Co.* v. *National Labor Rel. Bd.*, 303 U. S. 453, 82 L. Ed. 954, the court says:

"That fruits and vegetables handled by a canning company are grown within the state and that the activities of such company are confined to the state does not, where a substantial percentage of its products are sold by it in interstate and foreign commerce, render the National Labor Relations Act inapplicable.

"'Where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify federal intervention for its protection.'"

We do not consider that petitioner was engaged in producing goods for commerce among the states any more than a farmer would be who butchered his own cattle or hogs and sold the hides and offal to a purchaser of hides and offal, who later processed the same and sold the result in commerce. The line of demarcation has to be drawn some where. Why should not the line be drawn where the hides and offal come to rest in the hands of third parties who purchase and pay for the same and later on treat and ship the result as an independent act?

In *Kirschbaum* v. *Walling*, 316 U. S. 517, 86 L. ed. 1638, this question is treated in a learned opinion by Mr. Justice Frankfurter for the court. It is there said:

> "The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. See, e. g., Virginia R. Co. *v.* System Federation, R. E. D. 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592. Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law. Compare, for example, United Leather Workers International Union *v.* Herkert & M. Trunk Co., 265 U. S. 457, 68 L. ed. 1104, 44 S. Ct. 623, 33 A. L. R. 566, and Levering & G. Co. *v.* Morrin, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549, with National Labor Relations Bd. *v.* Friedman-Harry Marks Clothing Co., 301 U. S. 58, 81 L. ed. 921, 57 S. Ct. 645, 108 A. L. R. 1375, and National Labor Relations Bd. *v.* Fainblatt, 306 U. S. 601, 83 L. ed. 1014, 59 S. Ct. 668. Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the

States without putting an unconstitutional burden on interstate commerce. Compare Heisler *v.* Thomas Colliery Co., 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83, and Oliver Iron Min. Co. *v.* Lord, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526, with Sunshine Anthracite Coal Co. *v.* Adkins, 310 U. S. 381, 84 L. ed. 1263, 60 S. Ct. 907."

Again the Court said:

"We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation."

So it appears that each case must depend on its own facts. Petitioner contends that it never intended to cover cases where the work of the employee only (a) remotely affects commerce amongst the states or (b) where a local transaction is completed according to the contractual rights of the parties before any one touches the goods in contemplation of interstate commerce. This is the situation here. The petitioner had the undoubted right to sell the hides and offal in Oklahoma; the purchaser thereof had the unquestioned right to purchase the same. The title as well as possession completely and finally passed at the advent of the sale. The petitioner did not "produce" these hides or the inedible portions of the carcass "for sale" in interstate commerce. It produced them for sale in the state. Likewise it "produced" the edible portions for sale in the state and did sell all of them in the state. It was not necessary to the production of the meats, etc., processed by petitioner which were sold and consumed in Oklahoma, that the independent operators who purchased the hides and offal should themselves process the offal and hides and then send the result into commerce amongst the states. So the ultimate use to which the purchasers of the hides and offal were put was not a necessary act upon

which the production of the goods to be sold by the petitioner depended. In the absence of such a necessity the Act should not apply.

PROPOSITION TWO.

The Exemption Clause of the Act Applies Here.

Section 213, Title 29 U. S. C. A. provides:

> "The provisions of Section 206, and 207, shall not apply in respect to * * * (2) any employee employed in any retail or servicing establishment the greater part of whose selling or servicing is in intrastate commerce * * *".

On this question the trial court found as a fact:

> "It is disclosed in the record that the value of the hides and offal, being that portion of the carcasses which is inedible, represents from 3 to 4 per cent. of the total value of the carcasses. Therefore the removal of the hides and offal from the edible portion of the animals is as much, or more, an act in connection with the preparation of the edible portion for market as it is an act of the salvaging of the inedible portion."

This exemption clause must have a purpose. It must certainly apply where the main object of the plant is to produce goods for local consumption. It most certainly does apply to the situation here under the facts as found by the trial court. Stated precisely here is the factual situation: Petitioner has a slaughter room. From 4 to 7 employees kill and strip the animal. The edible portions are made into food and sold and consumed by local customers. The hides and offal are then immediately sold to consumers at a fixed value per hundred weight. All in the world the employees in the killing room are doing is to prepare the animal so it can be used for food. In other

words, they service the animal. The result is that 96 per cent of the animal goes into food products and is sold as such to local customers in the state.

The effect of the holding of the Circuit Court opinion and judgment is that the 4 to 7 employees in the petitioner's plant are held to be under the Act, while the other employees are held not to be under the Act. When the killing operations are separated they become a servicing for the objective of the plant which must be conceded to be the production of foods for sale in the state.

The employees of the petitioner who removed the hides from the animals "serviced" the animals as a necessary procedure to place the edible portions in condition to be sold and consumed in the state. They did not produce goods or work on goods to be sold out of the State. The ultimate consumer was in the State.

To hold that the sale of the offal was ineffective to sever petitioner's connection therewith would be tantamount to saying that the well recognized right of bargain and sale under state law is a matter of Federal concern. The question of state rights is fundamentally involved here. Until Congress has specifically spoken on the question the state law on sales certainly would and should prevail. Subdivision J of Section 3 of Fair Labor Standards Act of 1938, the Act here involved seems to recognize this fundamental principle in the language thereof.

The employees of the petitioner who removed the hides from the animals serviced the animals for one purpose, only: to place the edible portions thereof in a condition to be sold to local trade. It was necessary.

Our conception is that Butcher Packing Company to whom the offal is sold and which company in turn processes the same and sells the result outside of the state is engaged in processing goods for commerce within the meaning of

the Act. Likewise E. W. Gruendler & Company to whom petitioner sold the hides and who in turn processed the same and sold 95 per cent of the result outside of the state is also engaged in commerce within the meaning of the Act. Not so in respect to the petitioner who did none of these things.

The petitioner asks that this Court grant the writ of certiorari prayed for, and review the decision of the Court below.

Respectfully submitted,

By JAMES S. TWYFORD,
SOLON W. SMITH,
907 Tradesmens National Bank Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

(4358)

No. [illegible]

In the Supreme Court of the United States

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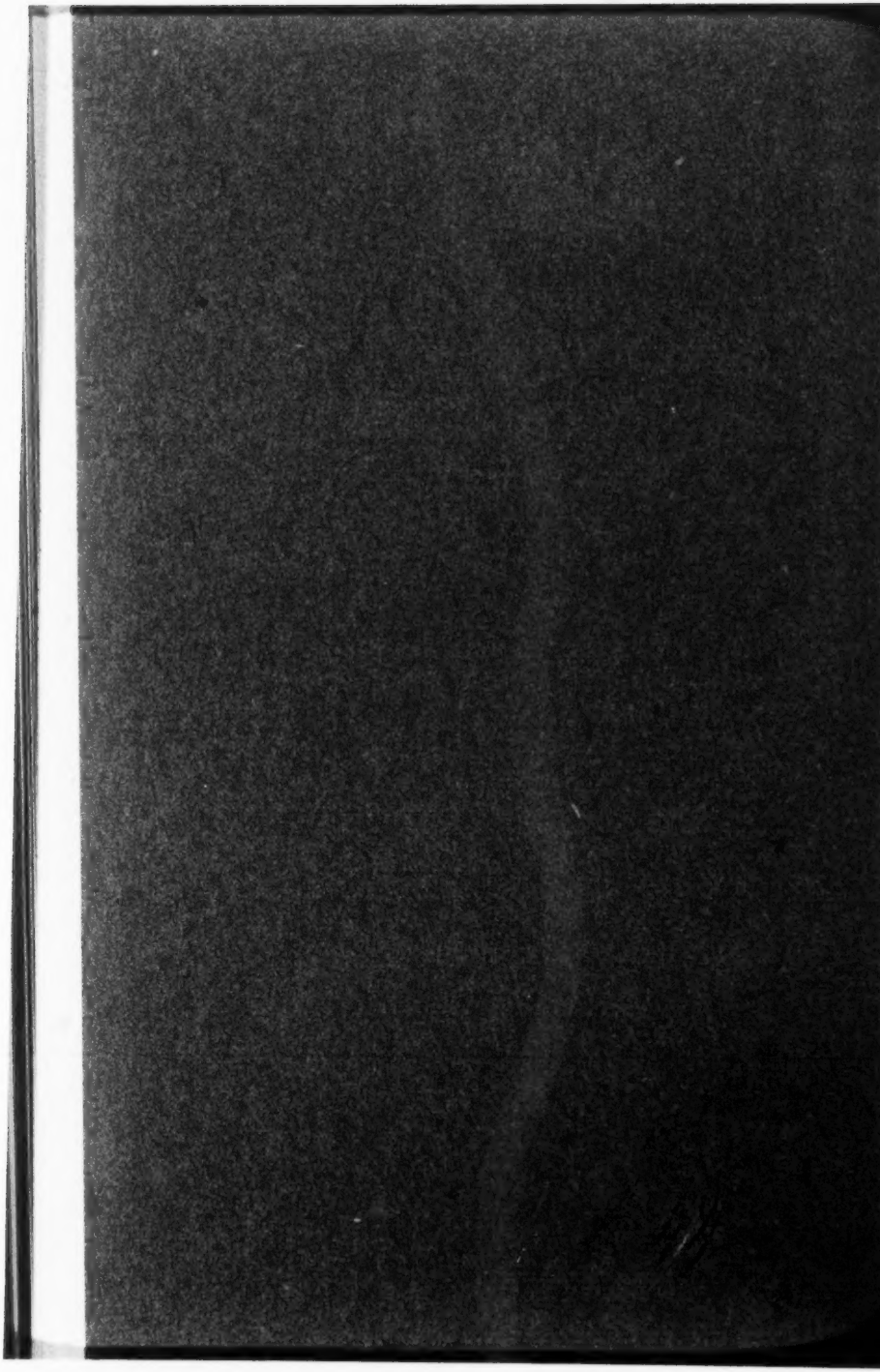

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CITATIONS

513764—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 699

PEOPLES PACKING COMPANY, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 68–78) is reported in 42 F. Supp. 868. The opinion of the Circuit Court of Appeals (R. 81–87) is reported in 132 F. (2d) 236.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 16, 1942 (R. 87). The petition for a writ of certiorari was filed on February 3, 1943. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

Petitioner owns and operates a plant at which it engages in the slaughter of cattle and hogs and the manufacture of beef and pork products. The plant contains a slaughtering department in which the inedible portions of the animal are removed and other related operations are performed by petitioner's employees. Only the inedible products move in interstate commerce. The questions are:

1. Whether the employees in the slaughtering department are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

2. Whether the slaughtering department is a "service establishment" within the meaning of Section 13 (a) (2) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, provide as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (i) "Goods" means goods * * *, wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the

ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

STATEMENT

Petitioner operates a plant in Oklahoma City, Oklahoma, where it slaughters cattle and hogs purchased in Oklahoma, and manufactures pork products (R. 20, 25, 64–65). Petitioner employs

approximately 40 persons.[1] From four to seven work in the slaughtering department and another is a night watchman for the entire plant (R. 48). All the employees in the slaughtering department kill and dress the animals and remove the inedible portions, including the hides of cattle (R. 20–22, 65). "The major portion of their manual efforts is exerted in the removal of the hides and the inedible portions from the carcasses" (R. 82).

Petitioner sells all of its meat products in Oklahoma for local consumption (R. 26, 29, 65), but practically all of the hides and offal are used in the manufacture of products which are shipped to other States. All of the offal, amounting to thousands of pounds each month (R. 51–52), is sold daily to the nearby Butcher Packing Company (R. 23, 28, 30) where it is converted into tankage and grease (R. 42–43). The Butcher Company ships large quantities of grease out of the State to Procter & Gamble Company, a soap manufacturer (R. 42–43), and also sells large quantities to the Cato Oil & Grease Company in Oklahoma City which uses grease to make lubricants, a major portion of which is shipped out of the State (R. 43, 45–46). Prior to February 1940, all of the offal was sold daily to the Oklahoma Rendering Company, located in Oklahoma City (R. 23), which shipped 80 percent of its tankage and 100 percent of its grease

[1] The District Court found that the petitioner employs from 30 to 40 persons (R. 65). The court below stated this number to be "approximately 45" (R. 82).

to purchasers outside the State (R. 40). Petitioner sells almost all of its hides daily in their original green condition to E. W. Gruendler & Company in Oklahoma City (R. 22–23, 27, 36, 53–64), which ships 90 to 95 percent of all hides purchased out of the State (R. 38–39). Petitioner had reasonable grounds to anticipate these interstate shipments (R. 77–78).

The hides and offal represent from 3 to 4 percent in value of the carcasses and about 45 percent in weight (R. 24, 28, 65). Petitioner's gross income from the sales of these inedible portions approximated $26,000 in 1939 and 1940, and totalled in excess of $19,000 during the first seven months of 1941 (R. 12, 17).

On June 20, 1941, the Administrator filed a complaint (R. 6–9) for an injunction under Section 17 of the Fair Labor Standards Act, alleging that petitioner was employing persons in the production of goods for interstate commerce without paying them the required overtime compensation for hours in excess of the statutory maximum workweek and was shipping, delivering, and selling such goods with knowledge that shipment, delivery, and sale thereof in interstate commerce was intended. The action was limited to employees performing services relating to the slaughtering operations (R. 31). The petitioner's answer (R. 9–10) denied that any of its employees were engaged in the production of goods for commerce.

The District Court denied an injunction on the ground that none of petitioner's employees was engaged in production for commerce and, in any event, that the employees were exempt from the provisions of the Act because they were engaged in a "service establishment" (R. 66–67). The Circuit Court of Appeals reversed the decree and remanded with instructions to grant the injunction, holding that "the employees in question were employed in handling the hides and offal and in an occupation necessary to the production of the tanned hides, fertilizers, lubricants, and soap" (R. 85), and that "the slaughtering department was not a service establishment" because "it was not selling or furnishing services to consumers" (R. 87).

ARGUMENT

The decision of the court below is correct and does not call for further review.

1. The services performed by the employees in the slaughtering department fall squarely within the statute's definition of production. Sections 3 (i) and 3 (j). The application of the Act depends upon the services performed by them without regard to those performed by other employees in petitioner's plant or the principal business of the petitioner. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* No. 336, present Term; *Overstreet* v. *North Shore Corp.,* No. 284, present Term. There can be no

question that the operations of the employees here involved are necessary to the production of hides, tankage, and grease which eventually move in interstate commerce. The fact that petitioner's immediate sales of the materials which comprise these products are all intrastate is of no consequence. It is settled that the Act extends at least to the production of goods which the employer "intends or expects to move in interstate commerce," *United States* v. *Darby,* 312 U. S. 100, 118, or with respect to which he has "a reasonable basis" for such expectation. *Warren-Bradshaw Drilling Co.* v. *Hall,* No. 21, present Term. Accordingly, those of petitioner's employees whose major efforts are exerted in the removal of the hides and inedible portions from the carcasses (R. 82) are engaged in the production of goods for commerce within the meaning of the Act.

The fact that only 3 to 4 percent by value or 45 percent by weight of petitioner's production move in interstate channels does not establish that this production is not substantial and important. The regulatory power of Congress under the commerce clause does not turn upon matters of percentages. *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467. Where the volume, as distinguished from the percentage, of commerce involved is "more than that to which courts would apply the maxim *de minimis*" (*National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607), it is not material that a large percentage of peti-

tioner's products remain within the State. The court below recognized that if the Act applies to a small producer (*United States* v. *Darby, supra,* at 121, 123) "it must equally apply to the production for commerce of a small portion of the total production of a large producer" (R. 86). In fact, however, the value [2] of the products which move in interstate commerce is substantial in amount even though small in percentage, and the efforts of the employees involved are directed largely towards the processing of the goods which move in interstate commerce (cf. R. 82).

2. Petitioner also urges that the "service establishment" exemption provided by Section 13 (a) (2) is applicable to its employees in the slaughtering department who, it is contended, merely "service the animal" (Pet. Br. 23). A similar contention might be made with respect to virtually every operation carried on by most manufacturers, namely, that they were merely performing services with respect to the raw materials being converted into finished products. The purpose of Section 13 (a) (2), however, was not to exempt manufacturing

[2] During the period beginning with the effective date of the Act, October 24, 1938, and ending December 31, 1940, petitioner's total revenue from the sale of hides, offal, and other byproducts was in excess of $55,000 (R. 12, 17). Between January 1, 1941, and July 31, 1941, the corresponding figure was $19,000 (*ibid.*). In terms of weight the production of byproducts totalled many thousands of pounds each month (R. 51–64). Forty-five percent of the live weight of the animals slaughtered by appellee became inedible hides and offal (R. 24).

establishments, but establishments serving the needs of ultimate consumers. *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572–573 (C. C. A. 3), affirmed, 316 U. S. 517. Obviously, slaughtering animals and dividing their carcasses into meat and byproducts "is not the equivalent of selling services to consumers." See *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 526. The court below was plainly correct in holding, on the authority of the *Kirschbaum* decision (R. 87), that the slaughtering department was not a service establishment and that the operations performed there comprised the first steps in "the processing and producing of meat products and of leather, fertilizers, soaps, and lubricants" (R. 87). See also *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. (2d) 278, 280 (C. C. A. 2); *Walling v. Sondock*, 132 F. (2d) 77 (C. C. A. 5); *Consolidated Timber Co.* v. *Womack*, 132 F. (2d) 101 (C. C. A. 9).

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor,
United States Department of Labor.

MARCH 1943.

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